

No. 14575

United States
Court of Appeals
for the Ninth Circuit

OVETA CULP HOBBY, Secretary of Health,
Education and Welfare,

Appellant,

vs.

RALPH B. THORBUS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

JAN 11 1955

PAUL P. O'BRIEN,

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 12-31-54

CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	17
Ex. A—Transcript of Proceedings Relating to the Claim of Ralph B. Thorbus for Old-Age Insurance Benefits	23
Certificate of Clerk.....	90
Complaint	3
Ex. A—Referee's Decision	9
B—Letter Dated September 22, 1953, and Denial of Claim for Review...	15
Findings of Fact and Conclusions of Law.....	76
Judgment	86
Memorandum of Decision.....	69
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	88
Order Extending Time for Filing Record and Docketing Appeal	89
Statement of Points Upon Which Appellant Intends to Rely on Appeal.....	92

NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 14, Calif.

In the District Court of the United States in and
for the Southern District of California, Cen-
tral Division

No. 16010 T

RALPH B. THORBUS,

Plaintiff,

vs.

OVETA CULP HOBBY, Secretary of Health,
Education and Welfare,

Defendant.

COMPLAINT FOR REVIEW OF DECISION
OF DEPARTMENT OF HEALTH, EDUCA-
TION AND WELFARE UNDER SOCIAL
SECURITY ACT

The plaintiff, Ralph B. Thorbus, respectfully
represents to the Court as follows:

I.

That he is a citizen of the United States of Amer-
ica, residing in the County of Los Angeles, State of
California.

II.

That this proceeding is brought to review the de-
cision of Referee John L. Landfair of the Depart-
ment of Health, Education and Welfare, Social
Security Administration, on the claim of Ralph B.
Thorbus for old-age insurance benefits under the
Social Security Act as amended. [2*]

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

III.

That the plaintiff was a self-employed person as defined under provisions of the United States Code, Title 42, Sec. 411 (Sec. 211 of Social Security Act), as amended in 1950, and that plaintiff paid in good faith during the years 1951 and 1952 the employment tax required pursuant to the provisions of the Internal Revenue Code as set forth in Instruction 5, Schedule C, of Income Tax Form 1040, to wit: For the year 1951 on \$3,600.00 of his taxable income of \$4,592.42 the sum of \$81.00, and for the year 1952 on \$3,600.00 of his taxable income of \$3,993.46 the sum of \$81.00, which said payments were made to the office of the Director of Internal Revenue, Los Angeles, California.

IV.

That plaintiff during the years 1951 and 1952, and for many years prior thereto, leased from the owner thereof, The First Methodist Church of Los Angeles, certain real estate consisting of a lot and an unfurnished 72-room building thereon, and paid to the said owner of said real estate the full rental value of said real estate; that the said rental paid to said owner was listed by plaintiff as, and deducted as, an operating expense on Schedule C of Form 1040 of the Department of Internal Revenue filed with the Director of Internal Revenue in Los Angeles for the aforesaid years on or before March 15, 1952, and on or before March 15, 1953, respectively, in determining plaintiff's taxable income; that no part of plaintiff's taxable income which

is the basis of plaintiff's claim was derived from rental of real estate and the whole thereof was derived from services furnished by him to his guests in rooms and apartments furnished, maintained and serviced by him.

V.

That plaintiff serviced the 72 rooms in said building and supplied hotel-like services to the guests; that in addition to [3] supplying heat, light and janitorial service, plaintiff rendered additional services, some of which were as follows:

1. Plaintiff was on duty in said building on a 24-hour-a-day basis, and in addition he provided a manager and desk clerk who worked on a full-time basis and on whose salary plaintiff paid Social Security and other taxes, and whose duties included taking care of the various needs of the tenants, as is the custom of such an employee in a hotel, including, among other things, receiving and sorting mail, taking messages for guests and telephone service;

2. He supplied linen such as sheets, pillow cases and towels for the guests and provided for laundering of same. Plaintiff made a charge for the laundering, the receipts from which were declared and included as part of the income upon which his claim is based;

3. Plaintiff provided telephones on each of the floors of the building and the manager or he himself would answer the telephone calls and call the guests to the telephone by means of a buzzer system. Telephone calls to which the plaintiff or the man-

ager would call guests on some days numbered as many as 100;

4. He maintained a hotel-like lobby for the guests where newspapers and magazines were supplied by him for the use and convenience of the guests;

5. He provided gas, cooking stoves and paid all the utilities charges in connection with the use of same;

6. He provided all the repairs and other work necessary for the convenient occupancy of and upkeep of the rooms or facilities occupied by the guests;

7. He provided complete laundry facilities for all guests, including tubs, clotheslines and electric irons; [4]

8. He supplied dishes and cooking utensils and utilities for all guests;

9. He provided for the sorting and placing of guests' mail in individual mail boxes.

That most of the guests paid their bills on a weekly basis, a few, however, on a daily basis, and a few on a monthly basis.

VI.

Account No. 548-24-2990 was issued to plaintiff and the payments made under the provisions of the Social Security Act as amended were carried for the benefit of plaintiff under the aforementioned Act under said number.

VII.

That plaintiff is over the age of sixty-five (65) years. That said owner of said real estate sold the same and plaintiff's lease was terminated and his operations closed in January, 1953.

VIII.

That on February 25, 1953, plaintiff filed with the Department of Health, Education and Welfare, Social Security Administration, an application for old-age insurance benefits under the Social Security Act as amended, which application was disallowed on July 9, 1953, pursuant to a decision of Referee John L. Landfair of the Department of Health, Education and Welfare, Social Security Administration, and further disallowed by the Appeals Council of said Department of Health, Education and Welfare, which notified plaintiff that his request for review was denied, said notice being dated September 22, 1953.

IX.

That attached hereto and made a part hereof as Exhibits "A" and "B," respectively, are copies of the Referee's decision, and the [5] letter advising plaintiff of the denial by the Appeals Council of his request for review thereof, and Denial of Claim for Review.

X.

That as shown by the Referee's opinion, the issue is whether the plaintiff's income was that of a self-employed person as defined under provisions of the U. S. Code, Title 42, Sec. 411 (Sec. 211 of Social

Security Act), as amended in 1950, and under 20 Code of Federal Regulations, Sec. 404.1051, or was a rental from real estate as referred to in subparagraph (a) (1) of the above-referred-to Section of the U. S. Code, Title 42, Sec. 411, as amended in 1950, and as referred to in 20 Code of Federal Regulations, Sec. 404.1052 (a) (3).

XI.

That plaintiff respectfully submits to the Court that no part of his taxable income upon which he paid taxes as a self-employed person was derived from the rental of real estate, and that he was a self-employed person within the meaning and provisions of the Social Security Act and of the Regulations of the Secretary of the Department of Health, Education and Welfare, and that he is entitled to old-age benefits as provided for under said Act.

Wherefore, Plaintiff prays that the Secretary of Health, Education and Welfare, defendant herein, be required to answer this complaint; that the Plaintiff be granted leave to introduce and present evidence; and that the said decision of the Referee may be reviewed, reversed and set aside; that the refusal of the Appeals Council to review said Referee's decision be reversed; and that the claim of plaintiff herein for old-age benefits be allowed; and the Secretary of Health, Education and Welfare be Ordered to make payment of the claim of [6] plain-

tiff; and that the plaintiff may have such other and further relief as to the Court may seem proper.

/s/ RALPH B. THORBUS,

Plaintiff.

/s/ GIRARD F. BAKER,

Attorney for Plaintiff. [7]

EXHIBIT "A"

Department of Health, Education, and Welfare,
Social Security Administration, Office of Appeals Council

Referee's Decision

Case No.: 2518-10A.

Claim for: Old-Age Insurance Benefits.

In the case of

Ralph B. Thorbus (Name of Claimant)

Ralph B. Thorbus (Wage Earner's Name)

548-24-2990 (Social Security Account No.)

The above matter is before the referee on appeal from a determination by the Bureau of Old-Age and Survivors Insurance of the Social Security Administration, Department of Health, Education and Welfare. The claimant, Ralph B. Thorbus, disagreed with the Bureau's determination by filing a request

for a hearing before a referee. After due notice, a hearing was held at Los Angeles, California, on June 10, 1953, before the undersigned referee. The claimant was present and participated in the hearing.

The issue in this matter is whether the claimant had net earnings from self-employment for the period January 1, 1951, to January 19, 1953.

The Bureau determined that this claimant had no quarters of coverage to meet the term, "a fully insured individual," at the time he filed his application on February 25, 1953. The claimant feels he would have the necessary six quarters of coverage if his net earnings from self-employment derived from rental of apartment units in the years 1951, 1952 and up to January 19, 1953, were considered. It appears that the claimant furnished units and janitorial services for rent to the public. He furnished the apartment units, including [8] linens, but required the tenants to pay for the laundering of the linens. No personal services were furnished the tenants within the individual units other than repairs and painting as necessary for occupancy. The claimant leased the apartment from the First Methodist Church, of Los Angeles, California, at a definite monthly rental. The claimant rents out the units and provides utilities to the tenants for definite rentals by the week.

Section 211 (a) of the Social Security Act, as amended in 1950, provides that in computing gross income and deductions for the purposes of deter-

mining net income from self-employment, there shall be excluded:

“* * * rentals from real estate (including personal property leased with the real estate) and deductions attributable thereto, unless such rentals are received in the course of a trade or business as a real estate dealer.”

Regulations No. 4, approved December 18, 1951, in section 404.1052, with respect to the above exclusion, provides as follows:

“404.1052 Income excluded from net earnings from self-employment. For the purpose of computing net earnings from self-employment, the gross income derived by an individual from a trade or business carried on by him, the allowable deductions attributable to such trade or business, and the individual’s distributive share of the ordinary net income or ordinary net loss from any trade or business carried on by a partnership of which he is a member shall be computed in accordance with the following special rules:

“(a) Rentals from real estate.

“(1) Rentals from real estate (including personal property leased with the real estate), and the deductions attributable thereto, unless such rentals are received by an individual in the course of a trade or business as a real estate dealer, are [9] excluded. Whether or not an individual is engaged in the trade or business of a real estate dealer is determined by the application of the principles fol-

lowed in respect of the taxes imposed by sections 11 and 12 of the Internal Revenue Code. In general, an individual who is engaged in the business of selling real estate to customers with a view to the gains and profits that may be derived from such sales is a real estate dealer. On the other hand, an individual who merely holds real estate for investment or speculation and receives rentals therefrom is not considered a real estate dealer. Where a real estate dealer holds real estate for investment or speculation in addition to real estate held for sale to customers in the ordinary course of his trade or business as a real estate dealer, only the rentals from the real estate held for sale to customers in the ordinary course of his trade or business as a real estate dealer, and the deductions attributable thereto, are included in determining net earnings from self-employment; the rentals from the real estate held for investment or speculation, and the deductions attributable thereto, are excluded.

“(2) Payments for the use or occupancy of entire private residences or living quarters in duplex or multiple housing units are generally rentals from real estate. Except in the case of real estate dealers, such payments are excluded in determining net earnings from self-employment even though such payments are in part attributable to personal property furnished under the lease.

“(3) Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as for the ‘use or oc-

'cupancy' of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing [10] hotel services, or in tourist camps or tourist homes, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rentals from real estate; consequently, such payments are included in determining net earnings from self-employment. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas, the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, the collection of trash, and so forth, are not considered as services rendered to the occupant. * * *"

Under the law and regulations it is clear that the rentals received from an apartment house, for either furnished or unfurnished units, ordinarily constitute rental from real estate so that the only question is whether or not services of such a nature are rendered to remove them from that category and, in effect, to place the owner or lessee in the position of running an apartment hotel. Since section 404.1052 (a) (3) of the Regulations No. 4 provides that the furnishing of heat and light, the cleaning of the public entrances, exits, stairways and lobbies, the collection of trash, etc., are not sufficient services in connection with the renting of

rooms in rooming houses, it is the referee's opinion that similar services rendered in connection with an apartment house are likewise insufficient in connection with the renting of apartments in an apartment house, furnished or unfurnished, and that the rentals continue to be excluded as rentals from real estate. The claimant does not allege he is a real estate dealer.

It is the finding of the referee that the claimant needed six [11] quarters of coverage for a fully insured status, he had none, and thus was short six quarters of coverage to be termed a fully insured individual. The referee further finds that rentals from units of a rented apartment house in 1951, 1952, and up to January 19, 1953, constitute rentals from real estate and thus are excluded as net income from self-employment.

Inasmuch as the claimant did not meet one of the principal requirements for entitlement to old-age insurance benefits, i.e., he was not a fully insured individual, it is the decision of the referee that the claimant is not entitled to the benefits for which he filed application.

Date: July 9, 1953.

/s/ JOHN L. LANDFAIR,
Referee. [12]

EXHIBIT "B"

Department of Health, Education and Welfare,
Social Security Administration, Washington, D. C.

In Reply Refer to File No. 09:AC

September 22, 1953.

Office of Appeals Council

In the case of Ralph B. Thorbus, Claimant and
Wage Earner, Social Security Account No.
548-24-2990.

Mr. Ralph B. Thorbus,
305 W. 8th Street,
Los Angeles, California.

Dear Mr. Thorbus:

There is enclosed herewith a copy of the Appeals Council's denial of your Request for Review of the referee's decision on your claim for old-age insurance benefits. Your Request for Review having been denied, the referee's decision stands as the final administrative decision on your claim.

If you desire a review of the referee's decision by a court, you may file a civil action in the district court of the United States in the judicial district in which you reside within sixty days from this date. For your information as to the action in the district court, your attention is directed to section 205(g) of the Social Security Act, as amended. If such an action is filed, Oveta Culp Hobby, Secretary of

Health, Education and Welfare, is the proper defendant.

Sincerely yours,

/s/ JOSEPH E. McELVAIN,
Chairman. [13]

Department of Health, Education, and Welfare,
Social Security Administration, Office of Appeals Council

Denial of Request for Review

Case No.: 2518-10A.

Claim for: Old-Age Insurance Benefits.

In the case of

Ralph B. Thorbus (Claimant)
Ralph B. Thorbus (Wage Earner)
548-24-2990 (Social Security Account No.)

This case is before the Appeals Council upon the request of the claimant for review of the referee's decision, rendered on the 9th day of July, 1953. We are of the opinion that a review of the referee's decision would result in no advantage to the claimant; therefore, the Request for Review is hereby denied.

OFFICE OF APPEALS
COUNCIL,

/s/ JOSEPH E. McELVAIN,
Chairman.

Dated: September 22, 1953.

Duly verified.

[Endorsed]: Filed November 4, 1953. [14]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now the defendant, Oveta Culp Hobby, Secretary of Health, Education, and Welfare, and for her answer to the plaintiff's Complaint on file herein, admits, denies and alleges as follows:

First Defense

I.

Answering Paragraph I of the Complaint, defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and on that ground denies each and every allegation contained therein.

II.

Answering Paragraph II of the Complaint, defendant admits the allegations contained therein. Further answering Paragraph II, defendant alleges that the Appeals Council, Social Security Administration, Department of Health, Education, and Welfare, on September 22, 1953, denied plaintiff's request for review of the decision of Referee John L. Landfair, and that under the regulations and practice of the Social Security Administration, the said Referee's [15] decision thereby became the "final decision" of the Secretary of Health, Education, and Welfare, within the meaning of Section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. 405(g).

III.

Answering Paragraph III of the Complaint, defendant admits that plaintiff reported on Schedule C of Income Tax Form 1040 that he had taxable income of \$4,592.42 for the year 1951, and \$3,993.46 for the year 1952, and that he reported in his Income Tax Form 1040 for each of those two years an alleged self-employment tax of \$81.00 computed with respect to \$3,600 of alleged self-employment income, and denies each and every other allegation in said paragraph. Further answering said Paragraph III, defendant alleges that plaintiff had no net earnings from self-employment in the years 1951 and 1952.

IV.

Answering Paragraph IV of the Complaint, defendant admits that during the years 1951 and 1952, and for many years prior thereto, plaintiff leased from the First Methodist Church of Los Angeles certain real estate consisting of a lot and an unfurnished 72-room building thereon (except a part of the basement of said building excepted from the lease by the said lessor), and that the rental paid to the said lessor was listed by the plaintiff as, and deducted by him as, an operating expense on Schedule C of Form 1040 of the Department of Internal Revenue, which said form was filed with the Director of Internal Revenue at Los Angeles on or before the dates alleged; and denies each and every other allegation in said paragraph.

V.

Answering Paragraph V of the Complaint, de-

fendant alleges that the plaintiff rented on a weekly basis furnished apartment units in the building leased from the First Methodist Church of Los Angeles, as aforesaid, admits that plaintiff supplied heat, light, and janitorial services, that plaintiff rented linens to certain of the tenants occupying space within said building, and that he effected, or caused to be effected, certain repairs and [16] painting in the premises leased, as aforesaid, and denies each and every other allegation in said paragraph.

VI.

Answering Paragraph VI of the Complaint, defendant admits that plaintiff was issued Social Security Account No. 548-24-2990, and denies each and every other allegation in said paragraph.

VII.

Answering Paragraph VII of the Complaint, defendant admits the allegations contained therein.

VIII.

Answering Paragraph VIII of the Complaint, defendant admits the allegations contained therein. Further answering Paragraph VIII, defendant alleges that prior to the decision of Referee John L. Landfair, described therein, the Bureau of Old Age and Survivors Insurance of the Social Security Administration, on April 1, 1953, made its determination disallowing plaintiff's application for old age benefits; that the hearing and decision of Referee John L. Landfair occurred subsequent to said determination of the Bureau of Old-Age and Sur-

vivors Insurance, and pursuant to plaintiff's request for hearing before a Referee.

IX.

Answering Paragraph IX of the Complaint, defendant admits the allegations contained therein. Further answering said Paragraph IX, defendant alleges that a certified copy of a full and accurate transcript of the entire record of proceedings relating to the claim of plaintiff for old-age insurance benefits under Title II of the Social Security Act, as amended, is attached hereto marked Exhibit "A" and hereby made a part hereof.

X.

Answering Paragraph X of the Complaint, defendant denies the allegations contained [17] therein.

XI.

Answering Paragraph XI of the Complaint, defendant denies the allegations contained therein.

Second Defense

I.

The Complaint fails to state a claim against defendant upon which relief can be granted.

Third Defense

I.

A certified copy of a full and accurate transcript of the entire record of proceedings relating to the

claim of plaintiff for old-age insurance benefits under Title II of the Social Security Act, as amended, is attached hereto marked Exhibit "A" and made a part hereof.

II.

The Bureau of Old Age and Survivors Insurance, Social Security Administration, Federal Security Agency, Referee John L. Landfair of the Social Security Administration, the Appeals Council of the Social Security Administration, and Oveta, Culp Hobby, Secretary, Department of Health, Education, and Welfare, have made findings of fact, supported by substantial evidence, to the effect that plaintiff's income for the period of January 1, 1951, to January 19, 1953, constituted "rentals from real estate (including personal property leased with the real estate)," and that such rentals were not "received in the course of a trade or business as a real estate dealer" and further found that said rentals were not "net earnings from self-employment," as the said terms are defined in the Social Security Act, as amended. [18]

Fourth Defense

This Honorable Court has no jurisdiction to grant any of the relief prayed for in the Complaint, except that it has jurisdiction pursuant to Section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. 405(g), to review the decision rendered by the Referee on July 9, 1953, which constitutes the defendant's final decision, and to enter a judgment

affirming, modifying, or reversing that decision with or without remanding the cause for a rehearing.

Wherefore, defendant prays for judgment in accordance with Section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. 405(g), affirming the decision complained of; and that the Complaint be dismissed; and that defendant recover its costs and disbursements incurred herein.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Attorneys for Defendant.

EXHIBIT A

In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil Action No. 16010T

RALPH B. THORBUS,

Plaintiff,

vs.

OVETA CULP HOBBY, Secretary, Department
of Health, Education, and Welfare,

Defendant.

CERTIFICATION

I, Joseph E. McElvain, Chairman, Appeals Council, Social Security Administration, Department of Health, Education, and Welfare, under authority conferred upon me by the Secretary, hereby certify that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings relating to the claim of Ralph B. Thorbus for old-age insurance benefits under Title II of the Social Security Act, as amended, such transcript, including application for benefits, testimony and other evidence upon which the decision of the referee of the Appeals Council, Social Security Administration, was based.

Date: December 16, 1953.

[Seal] /s/ JOSEPH E. McELVAIN,
Chairman, Appeals Council, Social Security Admin-
istration, Department of Health, Education and
Welfare. [20]

Department of Health, Education, and Welfare,
Social Security Administration, Washington,
D. C. Office of Appeals Council.

September 22, 1953.

In the case of Ralph B. Thorbus, Claimant and
Wage Earner, Social Security Account No.
548-24-2990.

Mr. Ralph B. Thorbus,
305 W. 8th Street,
Los Angeles, California.

Dear Mr. Thorbus:

There is enclosed herewith a copy of the Appeals Council's denial of your Request for Review of the referee's decision on your claim for old-age insurance benefits. Your Request for Review having been denied, the referee's decision stands as the final administrative decision on your claim.

If you desire a review of the referee's decision by a court, you may file a civil action in the district court of the United States in the judicial district in which you reside within sixty days from this date. For your information as to the action in the district court, your attention is directed to section 205(g) of the Social Security Act, as amended. If such an action is filed, Oveta Culp Hobby, Secretary of Health, Education, and Welfare, is the proper defendant.

Sincerely yours,

/s/ JOSEPH E. McELVAIN,
Chairman.

Enclosure.

cc—Referee Landfair,
F. O. Los Angeles, Calif.

mw :mw

[In Margin]: 740366.

[Stamped]: Department of Health, Education, and Welfare, Sept. 23, 1953. Signed and [21] Mailed.

(File Copy.)

Department of Health, Education, and Welfare,
Social Security Administration, Office of Appeals Council

Denial of Request for Review

Case No. 2518-10A.

Claim for: Old-Age Insurance Benefits.

In the case of:

Ralph B. Thorbus (Claimant)

Ralph B. Thorbus (Wage Earner)

548-24-2990 (Social Security Account No.)

This case is before the Appeals Council upon the request of the claimant for review of the referee's

decision, rendered on the 9th day of July, 1953. We are of the opinion that a review of the referee's decision would result in no advantage to the claimant; therefore, the Request for Review is hereby denied.

OFFICE OF APPEALS
COUNCIL,

/s/ JOSEPH E. McELVAIN,
Chairman.

Date: September 22, 1953. [22]

Federal Security Agency
Social Security Board
Office of Appeals Council

Request for Review of Referee's Decision

Claim for: Old-Age Insurance Benefits.

Case No.: 2518-10A.

In the case of—

Ralph B. Thorbus (Name of claimant).

Ralph B. Thorbus (Wage earner's name).

548-24-2990 (Social Security Account number).

To the Appeals Council:

I disagree with the referee's decision on the above claim and request that the Appeals Council review it.

Remarks: (If you wish you may use this space for statement of reasons for disagreement.)

(See rider and affidavit attached hereto and made a part hereof.)

/s/ RALPH B. THORBUS,
305 W. 8th Street,
Los Angeles, California.

Date: July 31, 1953.

Acknowledgment of Request for Review
of Referee's Decision

Your request for review of the referee's decision in this case was filed on Aug. 3, 1953, at Los Angeles 12, Calif.

The Chairman of the Appeals Council will notify you of the Council's action on your request.

(For the Social Security Board.)

By /s/ A. WEISS,
Claims Assist.,
Los Angeles 12, Calif.

To: Ralph B. Thorbus,
821 S. Hope St.,
Los Angeles 17, Calif.

[Stamped]: Department of Health, Education and Welfare. [23]

The claimant respectfully disagrees with the decision of Referee John L. Landfair and requests that the said Appeals Council review it.

The claimant, as basis for the appeal, submits the following:

The decision of the Referee from which this appeal is taken is in effect that claimant has no self-employed income as a basis for his claim for benefits on the theory that the two years of such income, the existence of which is not in question, was rental from real estate.

This theory is contrary to the actual facts.

It is submitted that claimant's income was that of a self-employed person, as defined under provisions of the United States Code, Title 42, Section 411 (Sec. 211 of Social Security Act), as amended in 1950, and was not a rental from real estate as is referred to in Subparagraph (a) (1) of the above-referred-to Section. It is further submitted that said income is not rental from real estate under Title 20, Section 404.1052 (a) (3) of Regulation No. 4, approved December 18, 1951, being derived from payments for use or occupancy of rooms and apartments where services were rendered to the occupants.

The claimant himself did not own the real estate but leased the same unfurnished from the owner thereof, the First Methodist Church of Los Angeles, and paid to the owner the full rental value thereof. This full rental value of the real estate was de-

ducted as expense in determining claimant's self-employed income which he returned in good faith and on which he paid the tax for two full years under said Title 42, Section 411. Said self-employed income was derived from claimant's services furnished to his guests and from payments for the use or occupancy of furnished rooms and apartments and for supplies and other services which he provided through his employees.

Claimant devoted his full time to the operation of said 72-room house and kept himself available on a 24-hour basis subject to call.

This factual situation is entirely different from that contemplated by Congress in adopting said Section 411, Title 42 (Section 211 (a) (1) of the Social Security Act as amended) where it is clear that the persons intended to be excluded are the owners of real estate collecting rentals thereon and supplying only minor or no services.

In further support of claimant's appeal, the affidavit of claimant is attached hereto.

/s/ RALPH B. THORBUS. [24]

Before the Honorable Appeals Council of the Department of Health, Education and Welfare,
Social Security Administration

AFFIDAVIT IN SUPPORT OF
CLAIM OF RALPH B. THORBUS

Case No. 2518-10A
Social Security Act No. 548-24-2990

State of California,
County of Los Angeles—ss.

Ralph B. Thorbus, being first duly sworn, deposes and says:

That he is the claimant for old age insurance benefits in Case No. 2518-10A in connection with Social Security Account No. 548-24-2990, and is the Appellant from the Referee's decision therein. That he makes this affidavit in support of his said claim and his appeal.

That during the entire years 1951 and 1952 he leased from the owner thereof certain real estate consisting of a lot and an unfurnished 72-room building thereon, and paid to the said owner of said real estate the full rental value thereof.

That said rental of said real estate was deducted by claimant in determining the income which affiant in good faith voluntarily returned as income from self-employment and upon which he paid taxes for said two years pursuant to Instruction No. 5 on

Schedule C, filed with the U. S. Collector of Internal Revenue with Form 1040.

That, therefore, no part of claimant's said income so returned was derived from the rental of real estate, nor from personal property leased therewith.

That the whole of said income which is the basis of affiant's claim was derived from services furnished to his guests by claimant and from payment for the use and/or occupancy of furnished rooms and apartments.

That claimant serviced the said 72 rooms in the said house and supplied hotel-like services to the guests. In addition to supplying heat, light and janitorial services, as does any hotel or boarding house, the claimant rendered additional services, some of which were as follows:

(1) He provided a manager and desk clerk who worked on a full time basis and on whose salary claimant paid Social Security and other taxes, and whose duties included taking care of the various needs of the tenants, as is the custom of such employee in a hotel, including, among other things, receiving and sorting mail, taking messages for guests and telephone service;

(2) He supplied linen, such as sheets, pillow cases, and towels for the guests, and provided for the laundering of same. Claimant made charge for the laundering, receipts from which were declared and included as part of the income upon which this

claim is based, and [25] said receipts certainly cannot be classified as rentals from real estate;

(3) The claimant provided telephones on each of the floors of the building, and the manager or he, himself, would answer the telephone calls and call the guests to the phone by means of a buzzer system. Phone calls to which the claimant or the manager would call guests on some days numbered as many as 100;

(4) He maintained a hotel-like lobby for the guests where newspapers and magazines were supplied by him for the use and convenience of the guests;

(5) He provided gas cooking stoves and paid all the utilities charges in connection with the use of same;

(6) He provided all of the repair work necessary to the room or facilities for which, under ordinary conditions, the guest would be required to pay;

(7) He provided complete laundry facilities for all guests, including tubs, clotheslines, clothespins, ironing boards, and electric irons;

(8) He supplied dishes and cooking utensils for all guests;

(9) He provided for the sorting and placing of guests' mail in individual mail boxes.

In conclusion, it is respectfully submitted that the claimant is entitled to the benefits of the Social Security Act as a self-employed person because of

his two years' income derived from said services rendered as an apartment house operator and from payments for the use or occupancy of furnished rooms and apartments, and that the decision of the Referee should be reversed by the Appeals Council.

/s/ RALPH B. THORBUS.

Subscribed and Sworn to Before Me This 31st day of July, 1953.

/s/ GIRARD F. BAKER,
Notary Public in and for Said
County and State. [26]

Department of Health, Education, and Welfare,
Social Security Administration, Office of Appeals Council

REFEREE'S DECISION

Case No.: 2518-10A.

Claim for: Old-Age Insurance Benefits.

In the case of:

Ralph B. Thorbus (Name of Claimant)

Ralph B. Thorbus (Wage Earner's Name)

548-24-2990 (Social Security Account No.)

The above matter is before the referee on appeal from a determination by the Bureau of Old-Age and

Survivors Insurance of the Social Security Administration, Department of Health, Education, and Welfare. The claimant, Ralph B. Thorbus, disagreed with the Bureau's determination by filing a request for a hearing before a referee. After due notice, a hearing was held at Los Angeles, California, on June 10, 1953, before the undersigned referee. The claimant was present and participated in the hearing.

The issue in this matter is whether the claimant had net earnings from self-employment for the period January 1, 1951, to January 19, 1953.

The Bureau determined that this claimant had no quarters of coverage to meet the term "a fully insured individual" at the time he filed his application on February 25, 1953. The claimant feels he would have the necessary six quarters of coverage if his net earnings from self-employment derived from rental of apartment units in the years 1951, 1952 and up to January 19, 1953, were considered. It appears that the claimant furnished units and janitorial services for rent to the public. He furnished the apartment units, including linens, but required the tenants to pay for the laundering of the linens. No personal services were furnished the tenants within the individual units other than repairs and painting as necessary for occupancy. The claimant leased the apartment from the First Methodist Church, of Los Angeles, California, at a definite monthly rental. The claimant rents out the

units and provides utilities to the tenants for definite rentals by the week.

Section 211(a) of the Social Security Act, as amended in 1950, provides that in computing gross income and deductions for the purposes of determining net income from self-employment, there shall be excluded: [27]

“* * * rentals from real estate (including personal property leased with the real estate) and deductions attributable thereto, unless such rentals are received in the course of a trade or business as a real estate dealer.”

Regulations No. 4, approved December 18, 1951, in section 404.1052, with respect to the above exclusion, provides as follows:

“404.1052—Income excluded from net earnings from self-employment. For the purpose of computing net earnings from self-employment, the gross income derived by an individual from a trade or business carried on by him, the allowable deductions attributable to such trade or business, and the individual’s distributive share of the ordinary net income or ordinary net loss from any trade or business carried on by a partnership of which he is a member shall be computed in accordance with the following special rules:

“(a) Rentals from real estate:

“(1) Rentals from real estate (including personal property leased with the real estate), and the deductions attributable thereto, unless such rentals

are received by an individual in the course of a trade or business as a real estate dealer, are excluded. Whether or not an individual is engaged in the trade or business of a real estate dealer is determined by the application of the principles followed in respect of the taxes imposed by sections 11 and 12 of the Internal Revenue Code. In general, an individual who is engaged in the business of selling real estate to customers with a view to the gains and profits that may be derived from such sales is a real estate dealer. On the other hand, an individual who merely holds real estate for investment or speculation and receives rentals therefrom is not considered a real estate dealer. Where a real estate dealer holds real estate for investment or speculation in addition to real estate held for sale to customers in the ordinary course of his trade or business as a real estate dealer, only the rentals from the real estate held for sale to customers in the ordinary course of his trade or business as a real estate dealer, and the deductions attributable thereto, are included in determining net earnings from self-employment; the rentals from the real estate held for investment or speculation, and the deductions attributable thereto, are excluded.

“(2) Payments for the use or occupancy of entire private residences or living quarters in duplex or multiple-housing units are generally rentals from real estate. Except in the case of real estate dealers, such payments are excluded in determining net earnings from self-employment even though such

payments are in part attributable to personal property furnished under the lease.

"(3) Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as for the [28] use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rentals from real estate; consequently, such payments are included in determining net earnings from self-employment. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas, the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, the collection of trash, and so forth, are not considered as services rendered to the occupant. * * *"

Under the law and regulations it is clear that the rentals received from an apartment house, for either furnished or unfurnished units, ordinarily constitute rental from real estate so that the only question is whether or not services of such a nature are rendered to remove them from that category and, in effect, to place the owner or lessee in the position of running an apartment hotel. Since section

404.1052(a)(3) of the Regulations No. 4 provides that the furnishing of heat and light, the cleaning of the public entrances, exits, stairways and lobbies, the collection of trash, etc., are not sufficient services in connection with the renting of rooms in rooming houses, it is the referee's opinion that similar services rendered in connection with an apartment house are likewise insufficient in connection with the renting of apartments in an apartment house, furnished or unfurnished, and that the rentals continue to be excluded as rentals from real estate. The claimant does not allege he is a real estate dealer.

It is the finding of the referee that the claimant needed six quarters of coverage for a fully insured status; he had none, and thus was short six quarters of coverage to be termed a fully insured individual. The referee further finds that rentals from units of a rented apartment house in 1951, 1952, and up to January 19, 1953, constitute rentals from real estate and thus are excluded as net income from self-employment.

Inasmuch as the claimant did not meet one of the principal requirements for entitlement to old-age insurance benefits, i.e., he was not a fully insured individual, it is the decision of the referee that the claimant is not entitled to the benefits for which he filed application.

Date: July 9, 1953.

/s/ JOHN L. LANDFAIR,
Referee. [29]

Federal Security Agency
Social Security Administration
Office of Appeals Council

Notice of Hearing

Case No: 2518-10A.

Claim for: Old-Age Insurance Benefits.

In the Case of:

Ralph B. Thorbus (Name of Claimant).

Ralph B. Thorbus (Wage earner's name).

548-24-2990 (Social Security account number).

To: Mr. Ralph B. Thorbus,
305 W. 8th Street,
Los Angeles 14, California.

Pursuant to your written request and the provisions of Section 205(b) of the Social Security Act, as amended, a hearing will be held by the undersigned, a referee of the Social Security Administration, Department of Health, Education, and Welfare, on the 10th day of June, 1953, at 1:30 p.m. o'clock in Room 330 of U. S. Post Office & Courthouse Building, 312 N. Spring Street, Los Angeles, California.

The issue to be determined is whether the claimant had net earnings from self-employment for the period January 1, 1951, to January 19, 1953.

The matters of fact on which findings will be made are whether claimant's income from operation of an

apartment house was excluded from "net earnings from self-employment" as rentals from real estate.

You may present at the hearing evidence on the matters of fact, either in the form of written documents or the testimony of witnesses.

You may call upon the manager of the Field Office of the Social Security Administration, Federal Security Agency, nearest your home for information and advice with regard to the hearing and the matters to be considered.

Important—Please sign and return at once the enclosed postal card notifying me whether you will be present at the above time. No postage is required on this card.

Remarks:

Date May 28, 1953.

JOHN L. LANDFAIR,
Referee.

Room 206, P. O. Building.
Glendale 5, Calif. [30]

Federal Security Agency
Social Security Administration
Office of Appeals Council

Request for Hearing

2518-10A

Claim for: Primary Benefits (Self-Employment).

In the case of:

Ralph B. Thorbus (Claimant).

Same (Wage earner).

548-24-2990 (Social Security Account Number).

To the Social Security Administration:

I disagree with the determination made on the above claim, and therefore request a hearing before a referee of the Social Security Administration. If convenient, I would like to have this hearing held on or about May 15, or any time at convenience of referee at or near Los Angeles, California.

Remarks:

(This space may be used for statement of your reasons for disagreement.)

I disagree with the determination that my income in 1951 and to 1952 was income from Real Estate Rentals and not self-employment income. I consider myself to be a self-employed person.

4/17/53

/s/ RALPH B. THORBUS,
(Claimant.)
305 W. 8th St.,
Los Angeles 14, Calif.

To: John L. Landfair, Referee,
313 E. Broadway,
Glendale, California.

[Stamped]: Received April 20, 1953. [31]

Case No. 2518-10A

Exhibits

Claim File
Page No.

A—Application for Old-Age Insurance Benefits Signed by Ralph B. Thorbus, Dated February 25, 1953.....	1
B—Profit or Loss From Business or Profession for Year 1952, Executed by Ralph B. Thorbus (Copy)	3-4
C—Schedule of Profit or Loss from Business or Profession and Computation of Self-Employ- ment Tax (for old-age and survivors insur- ance) for Year 1951, Executed by Ralph B. Thorbus	5
D—Statement of Claimant or Other Person, Signed by Ralph B. Thorbus, Received in Field Office February 25, 1953.....	8

E—Annual Report of Net Earnings from Self-Employment for Taxable Year, Signed by Ralph B. Thorbus, Dated February 25, 1953.	9
F—Copy of Letter to Ralph B. Thorbus from Social Security Administration, Dated April 1, 1953.	13

Ralph B. Thorbus—Case No. 2518-10A
Los Angeles, California—June 10, 1953

Opening Statement by the Referee:

This is case number 2518-10A, wherein Ralph B. Thorbus filed an application for old-age and survivors insurance benefits on February 25, 1953. He based his application on self-employment income as a manager or operator of an apartment house.

On April 1, 1953, the Bureau of Old-Age and Survivors Insurance disallowed Mr. Thorbus' claim stating they determined his income in 1951 and 1952 was income from real estate rentals and not self-employment. Mr. Thorbus disagreed with the Bureau's determination, feeling he was a self-employed person and that the profits he made should be credited on his record, and requested a hearing before a referee, which hearing is now in progress in Los Angeles, California, this 10th day of June, 1953.

In short, Mr. Thorbus, is that about what happened?

Mr. Thorbus: Yes.

The Referee: The issue to be determined in this

case is whether the claimant had net earnings from self-employment for the period January 1, 1951, to January 19, 1953.

Do you understand that to be the issue?

Mr. Thorbus: Yes.

The Referee: At this time I will introduce the following exhibits we have in the record. (Reads list of Exhibits A through F to claimant.)

RALPH B. THORBUS

the claimant herein, being first duly sworn, testified as follows: [33]

Examination by the Referee

Q. What is your full name?

A. Ralph B. Thorbus.

Q. Where do you live, Mr. Thorbus?

A. 821 South Hope, Los Angeles, California.

Q. Is that your signature on Exhibit A, which is an application?

(Shows Exhibit A to claimant.)

A. Yes, sir.

Q. During the years 1951 and 1952, what business were you in?

A. This apartment house business.

Q. Did you have an apartment house that you supervised or rented or leased?

A. I leased it from the First Methodist Church, of Los Angeles.

Q. What is the name of the apartment house?

A. Knickerbocker Apartments.

(Testimony of Ralph B. Thorbus.)

Q. How many apartments are there?

A. Thirty-seven.

Q. Do they all have modern conveniences?

A. Yes.

Q. Baths and stoves?

A. Yes, baths and that, but, of course, it is badly run down.

Q. Who furnished the furniture inside the apartments? A. I bought that 22 years ago.

Q. Such as stoves, chairs, etc.?

A. The usual equipment of a simple apartment house or rooming house, [34] whatever you want to call it.

Q. They paid you so much money for the rental of each apartment?

A. Each apartment had a tenant and paid so much a week.

Q. What were the rentals a week?

A. They run from \$4.00 to \$6.50 a week.

Q. Was that with a bath in each one?

A. All had baths.

Q. How about stoves?

A. Everybody had a stove.

Q. You furnished that and you furnished the other equipment?

A. I furnished all the other equipment.

Q. How about the linens?

A. Some people had their own, but I had a supply they could rent if they needed them.

Q. They could rent the linens from you?

A. Yes.

(Testimony of Ralph B. Thorbus.)

Q. Where did you keep the linens?

A. In my office.

Q. You kept the linens in there? A. Yes.

Q. If John Jones had an apartment there and wanted to change his linen, he would bring his dirty linen down to you and pick up the other from you?

A. Yes, and pay the cost of the laundry.

Q. And the rental value of the linens if he didn't have his own? [35]

A. Whatever it cost for the laundering. We always spoke of it as being laundry charge.

Q. He paid just for the laundering?

A. Yes.

Q. How about the forks and spoons?

A. They were supplied, all utensils and dishes.

Q. The cooking utensils and stove were furnished? A. Yes.

Q. What about their ice boxes?

A. They had wooden boxes, but they furnished their own ice. The iceman would come through every noon.

Q. How often would you renovate the apartment? After a man left or would you renovate it ever so often anyway, such as painting and cleaning up?

A. All the time we were doing that. We had a sign stuck out in front and would show the apartments to the callers as they came in. Of course there is nothing now or in the last year like it was in the 30's.

(Testimony of Ralph B. Thorbus.)

Q. If they came into the apartment and rented from you by the week, would they sign a lease?

A. No.

Q. They had a tenancy by sufferance? If you didn't want them you would tell them to get out?

A. Oh, yes.

Q. But if they stayed on from week to week they were tenants? A. Yes. [36]

Q. Did they pay rent weekly or monthly?

A. Weekly.

Q. How many employees did you have for yourself? A. One. That is the housekeeper.

Q. What would she do?

A. She would take care of the office and show callers around.

Q. She would show the apartments to prospective new tenants?

A. Oh, yes, to inquirers.

Q. Did she go in and sweep any of the apartments? A. No, no.

Q. After they had moved, she didn't give any inside service?

A. No, we turned the apartments over all cleaned.

Q. Then they would take care of it from there on? A. Yes.

Q. Did you furnish brooms and things like that?

A. Yes. There were back porches on each floor and there were rubbish barrels there.

Q. Were they supposed to carry the garbage to the barrels?

(Testimony of Ralph B. Thorbus.)

A. Most people would carry that kind of stuff to the barrel on their floor.

Q. Like the combustible garbage?

A. Yes.

Q. Did you have an incinerator?

A. No. The rubbish collector come three times a week and picked it up. [37]

Q. And the same was true with the combustible garbage?

A. Big trucks would come around early in the morning, see, and pick that up.

Q. There was one place it had to be put in?

A. On each floor, yes.

Q. They would put it all in one place and it was up to you to get it hauled away?

A. Yes, we had to move it down so it could be taken away.

Q. How about the garbage?

A. The garbage was handled the same way in cans. There was three different services that I employed.

Q. It was up to you to take care of that?

A. Oh, yes.

Q. After you had rented the apartment you didn't go inside? A. No.

Q. Did you furnish utilities?

A. Yes, I did.

Q. Water and electricity?

A. We furnished that.

Q. That was in the bargain?

A. Yes, and it was free, incidentally.

(Testimony of Ralph B. Thorbus.)

Q. Where did you get your right to rent the apartment? Did you have a lease?

A. Yes, from the First Methodist Church.

Q. What did you have to pay annually for that lease? [38]

A. It is about \$300.00 a month.

Q. You paid by the month on your lease?

A. Yes.

Q. And it was up to you to decide whether you could make anything or not?

A. You bet. Incidentally, the church occupied the front room in the basement for a Sunday School room. They rebated to me so much for estimated light and water.

Q. But not for the space?

A. No, that was held out on me when I signed the lease. But I was allowed \$3.25 a month for the light and water.

Q. And you paid them monthly?

A. I paid them monthly.

Q. But you collected from your tenants weekly?

A. Yes.

Q. Do you think I have everything in here I need to have in this case, with that letter you gave to me? A. I think so.

Q. Do you have any proposed findings or conclusions you want to make in your case, Mr. Thorbus?

A. I am 73 years old to begin with. I have put in a good long time there.

Q. Over 22 years?

A. Yes, 22 years. This buyer came along with

(Testimony of Ralph B. Thorbus.)

pocket full of money and he bought the [39] property.

Q. You sold it to him?

A. The church sold the ground and building.

Q. Did you get any recovery on your lease?

A. How's that?

Q. Did they make a settlement with you for the rest of your lease?

A. Well, no, not in that way. The idea was when he came along and finally made a deal with them, why, it was up to me to protect myself. He was Jewish—and I am holding nothing against Jews at any time at all—but naturally he made the best kind of a deal on me.

Q. He bought your equipment?

A. He bought my furniture and gave me \$1,000, and after a lot of dickering, I got 6 months' free rent. I am finishing that up.

Q. From your lease? A. Yes.

Q. Mr. Thorbus, I am not permitted to give verbal decisions in these cases. I have to study what you have told me, apply the law to the facts, and issue a written decision.

* * *

We have read the foregoing transcript and certify that it is a true and complete record of the hearing.

/s/ JOHN L. LANDFAIR,
Referee.

/s/ MIRIAM GARNER,
Reporter.

Date: June 10, 1953. [40]

FEDERAL SECURITY AGENCY
SOCIAL SECURITY ADMINISTRATION
Bureau of Old-Age and Survivors Insurance

Form Approved
GSA FPMR (41 CFR) Part 101-11.5

5010-106
Rev. 7-25-53

APPLICATION FOR OLD-AGE INSURANCE BENEFITS

**IF YOU NEED HELP IN COMPLETING THIS APPLICATION, CALL
AT, WRITE TO, OR TELEPHONE THE NEAREST FIELD OFFICE
OF THE SOCIAL SECURITY ADMINISTRATION**

All items on this form requiring an answer must be answered or marked "Unknown."

NOTICE.—Whoever makes or causes to be made any false statement or representation in connection with an application for Federal old-age and survivors insurance benefits is subject to not more than a \$1,000 fine or one year of imprisonment, or both.

I, Wife Benjamin L'Horbe 248-24-2991
(Name as it appears on my Social Security account number card)

hereby apply for the insurance benefits payable to me under the provisions of Title II of the Social Security Act, as amended.

1. When were you born? 1911 (Month) 3 (Day) 60 (Year)

2. Where were you born? Basta (City or town) Lincoln (County) Lincoln (State or foreign country)

3. Were you in the active military or naval service of the United States after September 16, 1940, and before July 26, 1947? No

If "Yes," have you received, or do you expect to receive, a benefit from any Federal agency other than the Social Security Administration? No (Yes or no)

If "Yes," what agency? None (Yes or no)

4. Are you married? No

If "Yes," give the following information: Wife's or husband's name _____

Age _____ Date of birth _____ Date of your marriage _____

Social Security account number of husband or wife, if age 65 or over _____

If you are a married woman, is your husband dependent on you for most of his support? No (Yes or no)

5. Have you any children, including stepchildren and adopted children, under 18 years of age and unmarried? No (Yes or no)

If "Yes," how many? None (Yes or no)

6. Give names of employers during the last 12 months:

NAME OF EMPLOYER	ADDRESS OF EMPLOYER	WORK BEGAN		WORK ENDED	
		MONTH	YEAR	MONTH	YEAR
<u>None</u>					

(If you need more space, continue your entries under "Remarks" (on other side) or attach a separate sheet.)

7. About how much were you paid during the two calendar quarters before this one? A calendar quarter is a 3-month period beginning January 1, April 1, July 1, or October 1. None

8. May we ask your employers for a report of your wages if we find it necessary? No (Yes or no)

9. Have you as a self-employed person (whether as a sole owner or partner) received income from a trade or business at any time after December 31, 1950? No (Yes or no)

If "Yes," during what period? From 1/1/51 To 1/1/51 None (Yes or no)

What kind of trade or business? Apartment House 2518-10A (Yes or no)

Old-age insurance benefits are not payable for any month in which you work, while under age 75, for wages of more than \$50 in employment covered by the Social Security Act. (In questions 10 through 13, "wages" means pay for employment covered by the Social Security Act. If you do not know whether your employment is covered, ask the nearest office of the Social Security Administration.)

10. Are you now working for wages of more than \$50 a month?
 11. Did you work for wages of more than \$50 in any of the last 7 months including the present month?
 (Yes or no)
 (Yes or no)

If "Yes," give the months: _____

(It is not necessary to include any month before you were 65 years old.)

12. Do you agree to notify the Social Security Administration promptly when you work for wages of more than \$50 a month while you are under age 75?
 (Yes or no)
 13. Do you agree to return any check sent to you for any month in which you have worked for wages of more than \$50 while you are under age 75?
 (Yes or no)

Old-age insurance benefits are not payable for one or more months if you, while under age 75, render substantial services as a self-employed person (whether as sole owner or partner) in a trade or business which is covered by the law, and have net earnings from self-employment which average more than \$50 a month for the taxable year. An annual report must be filed with the Social Security Administration after the end of any taxable year (which begins before the month in which you attain age 75) in which you have net earnings from self-employment averaging more than \$50 a month. (The term "self-employed person" used in the following questions means an individual engaged as sole owner or partner in a trade or business covered by the Social Security Act. If you do not know whether your self-employment is covered, ask the nearest office of the Social Security Administration.)

14. Are you now rendering substantial services as a self-employed person and do you expect to receive net earnings which will average more than \$50 a month for this taxable year?
 15. Did you render substantial services as a self-employed person in any of the last 7 months, including the present month, and have you received or do you expect to receive net earnings averaging more than \$50 a month for the taxable year (or for each of the taxable years involved)?
 (Yes or no)
 (Yes or no)

If "Yes," give the months: *11 through December 1951*

(It is not necessary to include any month before you were 65 years old.)

16. Do you agree to notify the Social Security Administration promptly when you expect that your net earnings from self-employment will average more than \$50 a month for a taxable year which begins before the month in which you attain age 75?
 (Yes or no)
 17. Do you agree to file with the Social Security Administration an annual report after the end of any taxable year which begins before the month in which you attain age 75, in which you have net earnings from self-employment averaging more than \$50 a month?
 (Yes or no)

If you do not report as agreed in items 12 and 17 above, you may lose additional months' benefits.

REMARKS: (This space may be used for explaining any answers to the questions.)

*I've just read and understand it. Regarding some time ago,
I did not realize we, \$900.00 net in January 1951
and do not expect it to be in business improvement business.*

Knowing that anyone who makes a false statement or misrepresents in connection with Federal old-age and survivors insurance benefits is committing a crime punishable under Federal law, I certify that the above statements are true.

If this application has been signed by mark (X), two witnesses who know the applicant must sign below, giving their full addresses.

Signature of applicant (write in ink):

Ralph B. Johnson
 (First name) (Middle initial) (Last name)

Address:

*21 S. Maple St.
La Crosse, Wis.*
 (Street and number)
 (City) (Zone number) (State)

Telephone number at which I can be reached:

444-12619
 (If none, write "None")

Date:

1/1/52
 (Month) (Day) (Year)

COMPUTATION OF SELF-EMPLOYMENT TAX
(For old-age and survivors insurance)

Name of self-employed person Ralph B. Thorbus

State nature of business, if any, subject to self-employment tax Apartment-House Operator

24. Net profit (or loss) shown on line 23, page 1.....	\$ <u>3993.46</u>	
25. Losses of business property shown on line 15, page 1.....		
26. Total of lines 24 and 25.....	\$ <u>3993.46</u>	
27. Less: Net income (or loss) from excluded services or sources included in line 26..... Specify excluded services or sources		
28. Net earnings from self-employment (line 26 less line 27).....	\$ <u>3993.46</u>	
29. Net earnings (or loss) from self-employment from partnerships, joint ventures, etc. (from column 10, Schedule K, Form 1065).....		
30. Total net earnings (or loss) from self-employment (line 28 plus line 29)..... (If total of net earnings is under \$400, do not make any entries below)	\$ <u>3993.46</u>	
31. Maximum amount subject to self-employment tax.....	\$ <u>3,600.00</u>	
32. Less: Wages paid to you during the taxable year which were subject to withholding for old-age and survivors insurance. (If such wages exceed \$3,600, enter \$3,600).....		
33. Maximum amount subject to self-employment tax after adjustment for wages.....	\$ <u>3,600.00</u>	
4. Self-employment income subject to tax—Line 30 or 33, whichever is smaller.....	\$ <u>3600.00</u>	
5. Self-employment tax—2½ percent of amount on line 34. Enter here and as item 5 (B), page 1, Form 1040.....	\$ <u>81.00</u>	

FILL IN ITEMS BELOW BUT DO NOT DETACH

Schedule C-a (Form 1040)
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

U. S. REPORT OF SELF-EMPLOYMENT INCOME
(For Federal Old-Age and Survivors Insurance)

1952

For calendar year 1952 or fiscal year beginning 1952, and ending 195.....

State nature of business subject
to self-employment tax Apartment House Operator

ENTER HERE THE SOCIAL SECURITY ACCOUNT
NUMBER OF THE PERSON NAMED BELOW

→

548	24	2990
-----	----	------

Enter total net earnings
from self-employment
shown on line 30 above. \$ 3993.46

ENTER BELOW NAME OF SELF-EMPLOYED PERSON AND BUSINESS ADDRESS

RALPH B. THORBUS (Name)

821 So. Hope St. (Address (Street and number, or rural route))

Los Angeles 17 (City or town, postal zone number) California (State)

Enter wages shown on
line 32 above. \$ none

Enter self-employment
income shown on line 30..... \$ 3600.00

Eduard B. B.

Federal Security Agency
Social Security Administration

Bureau of Old-Age and Survivors Insurance

548-24-2990 (Social Security Account Number)

Ralph B. Thorbus (Name of Wage Earner or Self-Employed Person)

Statement of Claimant or Other Person

Notice.—Whoever makes or causes to be made any false statement or representation in connection with an application for Federal old-age and survivors insurance benefits, is subject to not more than a \$1,000 fine or one year of imprisonment, or both.

Understanding that this statement is for the use of the Bureau of Old-Age and Survivors Insurance, I hereby certify that—

The attached copies of Schedules C for 1951 and 1952 are true and exact copies of separate Schedules C filed with the Director of Internal Revenue.

I further certify that the 1951 Schedule C was filed on or before March 15, 1952. [46]

Knowing that anyone who makes a false statement or misrepresents in connection with Federal old-age and survivors insurance benefits is committing a crime punishable under Federal law, I certify that the above statements are true.

Signature (write in ink):

/s/ RALPH B. THORBUS.

Address:

821 So. Hope St.,
Los Angeles 17, Calif.

Date: Feb. 26, 1953. [47]

EXHIBIT D

Case No. 2518-10A

Federal Security Agency
Social Security Administration
Bureau of Old-Age and Survivors Insurance

548-24-2990 (Social Security Account Number)

Ralph B. Thorbus (Name of Wage Earner or Self-Employed Person)

Statement of Claimant or Other Person

Notice.—Whoever makes or causes to be made any false statement or representation in connection with an application for Federal old-age and survivors insurance benefits, is subject to not more than a \$1,000 fine or one year of imprisonment, or both.

Understanding that this statement is for the use of the Bureau of Old-Age and Survivors Insurance, I hereby certify that—

The tenants in my apartment house during the period 1-1-51 to 1-19-53, the date I no longer had the lease of the apartment house, received the following services: I furnished them with linens. Of course the tenants had to pay for the laundry of same, that is, upon getting the linens from me or the housekeeper, the tenants were charged for a clean sheet 10c, pillow slip 5c, hand towel 3c, bath towel 7c, dish towel 3c. In the apartment house, I had a call bell system in calling the tenants to the phone, one phone located on each of the three floors in the building. The apartment house consisted of 37 apartments. In addition to this my housekeeper kept the halls clean and carried the rubbish to the back yard after the tenants had carried down same to the back porch of the apartment house. Whenever our tenants had callers, my housekeeper or I directed the callers to the correct apartment, the apartments being numbered. The tenants were furnished with gas, lights and heat. [48]

Knowing that anyone who makes a false statement or misrepresents in connection with Federal old-age and survivors insurance benefits is committing a crime punishable under Federal law, I certify that the above statements are true.

Signature (write in ink):

/s/ RALPH B. THORBUS. [49]

Federal Security Agency
Social Security Administration
Bureau of Old-Age and Survivors Insurance

548-24-2990 (Claim number)

Annual Report of Net Earnings from
Self-Employment for Taxable Year

All individuals under age 75 receiving old-age and survivors benefits must file this report if the individual had net earnings from self-employment of more than \$900 for the full taxable year. If the individual dies, a representative of his estate should file this report. It must be filed with the Social Security Administration within two months and fifteen days after the close of the taxable year.

Failure to File an Annual Report Within This Period May Result in Loss of Additional Benefits.

For an explanation of the effect of this Annual Report on your social security benefits, see the reverse side of this form.

Notice.—Whoever makes or causes to be made any false statement or representation (1) in connection with an application for Federal old-age and survivors insurance benefits, or (2) for other social security purposes is subject to not more than \$1,000 fine or one year's imprisonment, or both.

If you need help in completing this report call at, write to, or telephone your field office of the Social Security Administration.

1. This report is for my taxable year ending:
Month, 12; Day, 31; Year, 52.

2. Were your net earnings from self-employment \$1,800 or more? (Yes or No): Yes.

If Item 2 Is "No," Answer Items 3, 4, and 5

* * *

5. Were you the sole lessee of the trade or business? (Yes or No): Yes.

6. (a) Did you engage in self-employment, i.e., take part in the operation or management of a trade or business, in all months of the past taxable year? (Yes or No): Yes.

Instructions.—List below any full months in which you did not engage in business because you did not own the business, you had extended illness, someone else operated your business, etc. Where possible give an explanation for listing the month. For example, if you bought your business in March you would list January and February and opposite these months you would list as an explanation, "Not in Business—Bought Business March 8."

Months:

Explanation

7. Do you expect your net earnings from self-employment to exceed \$900 for the current taxable year? (Yes or No): No.

I made \$900.00 net this year 1-1-53 to 1-19-53 and rendered substantial services.

Date: 2-25-53.

Signature:

/s/ RALPH B. THORBUS. [50]

Information About Your Annual Report of Net Earnings from Self-Employment

Who Must File.—A beneficiary under age 75 during any part of his taxable year who (1) had net earnings averaging more than \$75 a month for the taxable year or (2) had benefits withheld because of his self-employment during the past year must file an Annual Report of Net Earnings from Self-Employment. (This report is in addition to your income tax return on Schedule C filed with Form 1040 with the Director of Internal Revenue.)

Purpose of Filing Annual Report.—Your Annual Report of Net Earnings from Self-Employment enables the Social Security Administration to determine how many months' benefits you should have received for the past taxable year. This report has no relation to benefits withheld or to be withheld for months you worked as an employee for wages of more than \$75 a month.

How Deductions From Benefits are Computed.—The chart below shows how the number of months of deductions will be computed which should have been imposed against your benefits for the past taxable year. The net earnings from self-employment which you received for your full taxable year, which is the amount you will show in questions 1 and 2 on the front of the form, will determine that number.

\$400 - \$900	None
900.01- 975	1 month
975.01-1,050	2 months

1,050.01-1,125	3 months
1,125.01-1,200	4 months
1,200.01-1,275	5 months
1,275.01-1,350	6 months
1,350.01-1,425	7 months
1,425.01-1,500	8 months
1,500.01-1,575	9 months
1,575.01-1,650	10 months
1,650.01-1,725	11 months
1,725.01 and over	12 months

Question 6 will show whether the number of months of deductions, computed under the chart above, should actually be made from your benefits. For example, if you did not engage in self-employment until June, the benefits you received through May would not be affected regardless of the amount of your net earnings in your taxable year. Also, if you sold your business in July, your net earnings would not affect your benefits for months after July.

Similarly, if during some or all months during the past taxable year you retired to the extent that you did not perform substantial services in connection with your trade or business, benefits for those months would not be affected by your total earnings during that taxable year. If you believe you have not performed substantial services, please go to your Social Security Administration field office. You should be prepared to give all the facts about your self-employment.

Benefits will not be withheld because of self-employment beginning with the month in which you become age 75. [51]

(Copy)

Always give Claim No. 548-24-2900-A when writing about your claim

Federal Security Agency.
Social Security Administration
Bureau of Old-Age and Survivors Insurance

Area Office,
San Francisco, Calif.

Field Office,
U. S. P. O. & Courthouse,
Los Angeles 12, Calif.

April 1, 1953.

Ralph B. Thorbus,
821 S. Hope St.,
Los Angeles 17, Calif.

Dear Sir:

This letter refers to your claim for benefits under Title II of the Social Security Act, as amended. Our records show that you are not now entitled to old-age insurance benefits.

The Social Security Act provides for payment of old-age insurance benefits to a person who is fully insured. To be fully insured you must have 6 quarters of coverage. A quarter of coverage is a calendar quarter in which the person has been paid \$50 or more in wages or for which he has been credited, after 1950, with \$100 or more of self-employment income.

Our records show that you have 0 quarters of coverage. When you have the necessary quarters for an insured status, you may again file application for benefits.

If you do not agree with this determination, you may request us to reconsider your claim or you may request a hearing before a referee of the Social Security Administration. Additional evidence is not required, but if new evidence is available it should be submitted. A request for a reconsideration or a hearing should be made promptly, and must be filed within 6 months of this date.

If you have any questions as to your claim or wish to request a reconsideration or hearing, you should call at or write the field office shown above.

Sincerely yours,

/s/ JOSEPH C. COLUMBUS,
Chief, Area Office.

It has been determined that your income in 1951 and 1952 was income from Real Estate Rentals and not self-employment income.

Case No. 2518-10A.

Exhibit F. [52]

Los Angeles, California

June 9, 1953.

Department of Health, Education
and Welfare,
Federal Security Agency,
Federal Building,
Los Angeles 12, California.

Attention: John L. Landfair, Referee.

Re: Ralph B. Thorbus, Claim on Social
Security No. 548-24-2990A,
Case No. 2518-10A.

Gentlemen:

Supplementing my previous application and the various information heretofore furnished you, the following is an outline of the business which I conducted for some twenty-two years under which I claim the benefits of the Social Security Law.

My income was not derived from the rental of real estate. The real estate was leased by me from the First Methodist Church, and the rent thereof was a part of my operating expenses.

My income was derived from the business which I operated in conducting the house on said premises and the services which I provided in the individual rooms and apartments, and in maintaining the conveniences such as lobbies, halls, washlines on roof, telephones, providing a manager on whose salary I paid social security taxes as well as other taxes,

and other items of service too numerous to mention, but including particularly the following:

I leased part of the building from the First Methodist Church unfurnished.

I rented the rooms and apartments to individual tenants to whom I rendered services and [53] provided services in part as follows:

(1) Furnished gas, electricity, hot and cold water;

(2) Furnished telephones to which the tenants could be called by buzzers;

(3) Provided a manager in the lobby who answered telephones and inquiries and looked after things generally;

(4) Kept two apartments: one of which I lived in that I might be available at all times to take care of anything that needed to be taken care of in the house, and the other I kept as a workshop and store-room for tools and supplies;

(5) I furnished linens to all of the tenants and provided for the laundering of it at a reasonable charge, the receipts therefrom being part of the income of my business;

(6) I made whatever repairs and replacements which were necessary to maintain the respective rooms and apartments such as plumbing, repair of paper shades, stove repairs, carpets, repairs to electric wiring and equipment;

- (7) I provided newspapers and magazines in the main lobby;
- (8) Provided for the disposal of rubbish, empty cans and bottles and garbage from the various apartments;
- (9) Kept the halls carpeted and clean and provided lighting therefor;
- (10) Kept the porches and steps in front of the building clean and swept; [54]
- (11) Kept the alley in the rear of the building clear and kept the rear porches on the three floors swept and clean; and
- (12) Provided washlines and complete laundry facilities for the tenants' individual laundering.

In other words, my net income after paying the rent on the real estate was from the use of the furniture, furnishings and supplies, and from the services which I rendered.

I will be glad to furnish whatever corroboration of the foregoing you deem necessary.

Yours truly,

/s/ RALPH B. THORBUS,

305 West 8th St.,

Los Angeles 14, California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 15, 1954. [55]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

This is an action to review a final decision of the Secretary of Health, Education and Welfare in which it was determined that the plaintiff herein was not entitled to old-age insurance benefits. Plaintiff applied for the benefits on the grounds that he was a self-employed person. There was no dispute that plaintiff had paid the self-employment tax for the necessary period. The Bureau denied his claim on the basis that his alleged self-employment income was "income from real estate rentals" and, hence, did not bring the plaintiff under the benefits of the Act. At plaintiff's request, he was accorded a hearing before a referee who reached a similar conclusion. [58] Plaintiff's request for a review of the referee's decision was denied by the Appeals Council and he now seeks review here.

The Social Security Act (Sec. 211(a)) provides that "* * * rentals from real estate (including personal property leased with the real estate) * * *" are not to be included in computing income from self-employment. Regulations of the Department more fully explain what income is to be excluded and what income is to be included. Regulation No. 4 (Sec. 404.1052(a)) provides in part:

"(2) Payments for the use or occupancy of entire private residences or living quarters in duplex or multiple-housing units are generally rentals from real estate. * * *.

"(3) Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rentals from real estate; consequently, such payments are included in determining net earnings from self-employment. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid [59] service, for example, constitutes such service; whereas, the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, the collection of trash, and so forth, are not considered as services rendered to the occupant."

From this Regulation, we adduce the following criteria in determining whether or not plaintiff's income was merely from the rental of real estate. To entitle him to benefits, plaintiff's services must have been more than merely furnishing heat and light, cleaning public entrances, exits, stairways and lobbies, collecting trash, and so forth. Such services must, rather, be considered services rendered to the occupant rather than merely the normal maintenance of the building. Such services must be

primarily for the convenience of the occupant and be something more than those services usually or customarily rendered in connection with the rentals of rooms or apartments. For example, if the services rendered by the plaintiff qualify the building as an apartment house furnishing hotel services, his income from such source is not rentals from real estate and is included as self-employment income. There are no separate findings of fact. The following excerpts from the referee's written decision contain what appear to be mixed findings of fact and conclusions of law:

"It appears that the claimant furnished units and janitorial services for rent to the public. He furnished the apartment units including linens, but required the tenants to pay for the laundering of the linens. No personal services were furnished [60] the tenants within the individual units other than repairs and painting as necessary for occupancy. The claimant leased the apartment from the First Methodist Church, of Los Angeles, California, at a definite monthly rental. The claimant rents out the units and provides utilities to the tenants for definite rentals by the week.

* * *

It is the finding of the referee that the claimant needed six quarters of coverage for a fully insured status, he had none, and thus was short six quarters of coverage to be termed a fully insured individual. The referee further finds that rentals from units of a rented apartment house in 1951, 1952, and

up to January 19, 1953, constitute rentals from real estate and thus are excluded as net income from self-employment.”¹

There is no specific indication, nor any implication, in the referee’s decision that he did not believe any of the plaintiff’s evidence. While he undeniably had the power to disregard those parts of the plaintiff’s testimony which he deemed untrue, it appears obvious that, rather, he took the facts as testified to by the plaintiff and corroborated by the documentary evidence, and, on the basis of these facts, concluded that the plaintiff was not within the definition of self-employed but, instead, derived

¹The remarks in *La Lone v. United States*, (Wash.) 57 F. Supp. 947, at 953 (reversed on other grounds, 152 F. 2d 43) would seem applicable:

“* * * The courts do not expect of an administrative agency that exactness or nicety which the appellate courts require of us inferior judges in distinguishing between findings of fact and conclusions of law. Nonetheless, it does not seem unreasonable to me to suggest that judicial [61] review cannot be nullified by a confused mixture of findings, inferences, and conclusions in the referee’s decision. *Beaumont, S. L. & W. R. Co. vs. United States*, 282 U. S. 74, 86, 51 S.Ct. 1, 75 L.Ed. 221; *State of Florida v. United States*, 282 U. S. 194, 215, 51 S.Ct. 119, 75 L.Ed. 291; *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 488, 62 S.Ct. 722, 86 L.Ed. 971; *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510, 55 S.Ct. 462, 79 L.Ed. 1023; *Eastern Central Motor Carriers Association v. United States*, 321 U.S. 194, 212, 64 S.Ct. 499. * * *. [62]

his income from the rentals of real estate and thus was not entitled to benefits. Thus the material facts can be adduced by an examination of the plaintiff's testimony and the exhibits that were introduced, which include a statement by the plaintiff to the board, and a letter written by him to the referee.²

Plaintiff rented the entire building from the owners. In turn, he rented each apartment or room furnished with the usual equipment of a simple apartment house or rooming house. Each apartment had a bath, stove and ice box. The plaintiff furnished all utensils and dishes, including silverware and cooking utensils. Plaintiff kept a supply of linens for the tenants which he rented to them for the laundry charge. There was a telephone on each floor and plaintiff operated a bell system to call the tenants to the telephone. Each floor had a rubbish barrel into which the tenants deposited refuse. Plaintiff or his employee would carry such rubbish to the back of the apartment where it was picked up by a contract rubbish collector. The same arrangement was afforded for cans and garbage. Plaintiff or his employee directed any callers to the correct apartment. Plaintiff supplied gas, light and heat for the tenants. Plaintiff maintained, for the tenants' convenience, lobbies, halls and washlines. He provided a manager in the lobby to answer telephones

²There is no indication that the plaintiff was represented by counsel at the hearing. Rather, it appears that the examination was conducted by the referee. It is apparent that plaintiff's case was not presented as vigorously as it might have been. [63]

and inquiries. He kept a workshop on the premises and a storeroom for tools and supplies, and was available at all times to take care of anything that needed to be taken care of in the house. He made whatever repairs and replacements which were necessary to maintain the respective rooms and apartments such as plumbing, repair of paper shades, stove repairs, carpets, and repairs to electric wiring and equipment. He kept newspapers and magazines in the main lobby. He kept complete laundry facilities for the tenants' individual laundering. He kept the porches, halls and steps clean and swept. He did regular renovating of the apartments, painting and cleaning them. He showed the apartments to prospective tenants. He furnished brooms and like articles.

Under the statute and regulations, it is the Court's opinion that the decision of the Secretary and her subordinates is not supported by substantial evidence. It cannot be said that plaintiff's income was merely derived from rentals of real estate. Plaintiff's organization and management of the property clearly brings the building within the classification of an apartment house offering hotel services. The maintenance of a lobby manager, the answering of telephone calls and summoning of tenants, the referring of guests, the maintenance of a supply of linens, the providing of newspapers and magazines in the lobby—all indicate more of a hotel than an apartment atmosphere. Admittedly, plaintiff did not supply maid service. However, the other services

rendered clearly were rendered to the occupant as distinguished from the building, and were primarily for the tenants' convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. Plaintiff clearly did not render either the quantity or quality of services usually offered by first class hotels. However, within the economic group served by plaintiff's [64] building, such services might well be deemed considerable—at least clearly enough to remove the income, so derived by plaintiff, from that class of income termed merely "rentals from real estate."

The difference between mere rentals from real estate and rental with personal services may be illustrated by the difference between the plaintiff here and plaintiff's lessor. The latter merely rents the building to the plaintiff without any services offered to the lessee. Such income clearly would appear to be merely income from real estate. Plaintiff, on the other hand, not only rented the out rooms but also offered many services to his tenants. Plaintiff's testimony, statement, and letter can lead only to the conclusion that the plaintiff worked at this apartment house, in addition to merely renting the rooms. His availability at all times to take care of anything that needed to be taken care of in the house, his making whatever repairs and replacements necessary to maintain the respective rooms and apartments, such as plumbing, repairs of paper

shades, stove repairs, carpets, and repairs to electric wiring and equipment, his maintaining of lobby facilities, the directing of guests, handling of telephone calls—all inescapably leave the conclusion that plaintiff was not merely a receiver of rentals from real estate, but rather, that he conducted a business on the premises, offering not only apartment facilities, but also many services to the occupants of the building. Any other conclusion is without support by substantial evidence. Taking the situation as a whole, the only conclusion supportable is that the plaintiff did not derive this income from mere rentals of real estate, but rather was [65] within the definition of "self-employed" and, therefore, entitled to benefits.

Reversed.

Dated this 6th day of July, 1954.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed July 6, 1954. [66]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause came on regularly to be heard on the 1st day of February, 1954, before the above-entitled Court, in Courtroom 6 thereof, the Honorable Ernest A. Tolin, Judge, presiding; plain-

tiff Ralph B. Thorbus appearing by Girard F. Baker, his attorney, and defendant Oveta Culp Hobby, Secretary of Health, Education and Welfare, appearing by Laughlin E. Waters by Louis Lee Abbot, her attorney; at said time the Court ordered that briefs be filed and that after the filing of said briefs oral arguments would be heard; briefs were thereafter filed by the parties through their respective counsel, and after the filing of said briefs the matter came on again regularly to be heard in said Courtroom before said Court on April 12, 1954, before the Honorable Ernest A. Tolin, Judge, presiding, said parties appearing by their said [68] counsel, and oral argument having been made to the Court, and additional briefs having been filed with the Court, and the Court being fully advised and having rendered its written opinion and memorandum of decision and caused the same to be filed herein, now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That plaintiff, Ralph B. Thorbus, is a citizen of the United States of America, and resides in the County of Los Angeles, and in the State of California.

II.

That it is true that this action was brought to review the final decision of the Secretary of Health, Education and Welfare on the claim of Ralph B.

Thorbust for old-age insurance benefits under the Social Security Act as amended.

III.

That it is true that plaintiff was a self-employed person within the meaning and intent of the provisions of the United States Code, Title 42, Sec. 411 (Sec. 211 of Social Security Act) as amended in 1950, and that it is true that plaintiff in good faith during the years 1951 and 1952 paid the employment taxes upon his income as such self-employed person in compliance with the provisions of the U. S. Internal Revenue Code, particularly as set forth in Instruction 5, Schedule C, of Income Tax Form 1040, i.e., that it is true that for the year 1951 said plaintiff paid tax on \$3,600.00, of his taxable income of \$4,592.42, in the sum of \$81.00, and for the year 1952 said plaintiff paid tax on \$3,600.00, of his taxable income of \$3,993.46, in the sum of \$81.00, and that said payments were made to the office of the Director of Internal Revenue, at Los Angeles, California. [69]

IV.

That it is true that plaintiff during the years 1951 and 1952, and for many years prior thereto, leased from the owner thereof, The First Methodist Church of Los Angeles, certain real estate consisting of a lot and an unfurnished 72-room building thereon, and paid to the said owner of said real estate the full rental value of said real estate; that the said rental paid to said owner was listed by plaintiff as, and deducted as, an operating expense on Schedule

C of Form 1040, of the Department of Internal Revenue filed with the Director of Internal Revenue in Los Angeles, for the aforesaid years on or before March 15, 1952, and on or before March 15, 1953, respectively, in determining plaintiff's taxable income; that no part of plaintiff's taxable income which is the basis of plaintiff's claim was derived from rental of real estate and the whole thereof was derived from services furnished by him to his guests in rooms and apartments furnished, maintained and serviced by him.

V.

That it is true that plaintiff serviced the 72 rooms in said building and supplied hotel-like services to the guests; that in addition to supplying heat, light and janitorial services of a maintenance and custodial nature, plaintiff supplied additional services of a type primarily for the convenience of the guests, some of which were as follows:

1. Plaintiff was on duty in said building on a 24-hour-a-day basis, and in addition he provided a manager and desk clerk who worked on a full-time basis and on whose salary plaintiff paid Social Security and other taxes, and whose duties included taking care of the various needs of the guests, as is the custom of such an employee in a hotel, including among other things, receiving and sorting mail, taking messages for guests and telephone service; he and his employee directed callers to the [70] proper apartment of a guest;

2. He supplied linen such as sheets, pillow cases and towels for the guests and provided for laundering of same. Plaintiff made a charge for the laundering, the receipts from which were declared and included as part of the income upon which his claim is based;

3. Plaintiff provided telephones on each of the floors of the building and the manager or he himself would answer the telephone calls and call the guests to the telephone by means of a buzzer system. Telephone calls to which the plaintiff or the manager would call guests on some days numbered as many as 100;

4. He maintained a hotel-like lobby for the guests where newspapers and magazines were supplied by him for the use and convenience of the guests;

5. He provided gas cooking stoves and paid all the utilities charges in connection with the use of same;

6. He maintained a workshop on the premises and a storeroom for tools and supplies and provided all of the repairs and work necessary to maintain the apartments such as plumbing, repair of paper shades, stove repairs, carpets, and repairs to electrical wiring and equipment, all primarily for the convenient occupancy of and upkeep of the rooms or facilities occupied by the guests;

He did regular renovating of the apartments,

painting and cleaning them. He also showed apartments to prospective tenants;

7. He maintained a rubbish barrel on each floor of the building into which tenants deposited refuse, and he or his employee would carry such rubbish to the back of the building where it was picked up by a rubbish collector employed by plaintiff on a contract basis, the same method of collection was also afforded for cans and garbage;

8. He provided complete laundry facilities for all guests, including tubs, clotheslines and electric [71] irons;

9. He supplied dishes and cooking utensils and utilities for all guests;

10. He provided for the sorting and placing of guests' mail in individual mail boxes.

That most of the guests paid their bills on a weekly basis, a few on a daily basis, but it is not true that some paid on a monthly basis.

VI.

That it is true that Account No. 548-24-2990 was issued to plaintiff and the payments made under the provisions of the Social Security Act as amended were carried for the benefit of plaintiff under the aforementioned Act under said number.

VII.

That it is true that plaintiff is over the age of sixty-five (65) years; that said owner of said real

estate sold the same and plaintiff's lease was terminated and his operations closed in January, 1953.

VIII.

That it is true that on February 25, 1953, plaintiff filed with the Department of Health, Education and Welfare, Social Security Administration, an application for old-age insurance benefits under the Social Security Act as amended, which application was disallowed by the Bureau of Old Age and Survivors Insurance of the Social Security Administration on April 1, 1953; that pursuant to plaintiff's request for hearing before a referee a hearing was granted before Referee John L. Landfair, on June 10, 1953, and pursuant to the latter's decision dated July 9, 1953, plaintiff's application was further disallowed; that plaintiff's request for review by the Appeals Council of said Department of Health, Education and Welfare was denied, said notice being dated September 22, 1953. [72]

IX.

That it is true that Exhibits "A" and "B" as attached to plaintiff's complaint herein are, respectively, true copies of said Referee's decision and of the letter advising plaintiff of the denial by the Appeals Council of his request for review thereof and of the denial of plaintiff's claim for review; that it is true that plaintiff had exhausted his administrative remedies without relief.

X.

That it is true that plaintiff's services rendered in the operation of his business were services rendered

primarily for the comfort and convenience of his guests, and not of a merely custodial or maintenance nature; that it is true that plaintiff's income was not derived from rentals from real estate but was derived from services rendered by him as a self-employed person and was net earnings from self-employment, and that plaintiff was a self-employed person within the intent and provisions of the Social Security Act and of the Regulations of the Secretary of the Department of Health, Education and Welfare; and that it is true that plaintiff is entitled to old-age benefits as provided under said Act.

XI.

That the decision of Referee John L. Landfair, a review of which was denied by the Appeals Council of the Department of Health, Education and Welfare, and therefore adopted as the said Appeals Council decision and therefore under the regulations and practice of the Social Security Administration became the final decision of the defendant, was not supported by substantial evidence.

XII.

That it is true that said referee made no separate findings [73] of fact; that the decision of said referee was a confused mixture of findings of fact and conclusions of law.

XIII.

That it is true that the said referee accepted the testimony of plaintiff and the documentary evidence submitted by plaintiff to him as true, but that said

referee drew erroneous conclusions therefrom contrary to the facts and the law.

XIV.

That it is true that plaintiff intended to do, and did, bring this action under Section 205 (g) of the Social Security Act as amended to obtain judicial review of a "final decision" of the Secretary of Health, Education and Welfare, holding that plaintiff was not entitled under the Act of old-age insurance benefits for which he had filed application.

Conclusions of Law

As conclusions of law, from the foregoing Findings of Fact, the Court Finds:

I.

That plaintiff was a self-employed person within the meaning of the Social Security Act as amended, had more than six quarters of coverage thereunder, is a fully insured individual under said Act, and is entitled to old-age insurance benefits as such commencing with the month of March, 1953.

II.

That the decision of the defendant and her subordinates in the Department of Health, Education and Welfare, is not supported by substantial evidence and should be reversed. [74]

III.

That plaintiff is entitled to a judgment and order requiring defendant and her subordinates in said

Department of Health, Education and Welfare, to recognize plaintiff as a fully insured individual under the Social Security Act as amended to determine the amount of moneys which plaintiff is entitled to receive each month as such fully secured individual, and to cause payments to be made to plaintiff in said amounts as so determined commencing with the month of March, 1953, together with plaintiff's costs and disbursements incurred in this action.

Let judgment be entered accordingly.

Done in open court this 10th day of August, 1954.

/s/ ERNEST A. TOLIN,
United States District Judge.

Receipt of Copy acknowledged.

Lodged July 29, 1954.

[Endorsed]: Filed August 12, 1954. [75]

In the United States District Court in and for the
Southern District of California, Central Division

No. 16,010-T

RALPH B. THORBUS,

Plaintiff,

vs.

OVETA CULP HOBBY, Secretary of Health,
Education and Welfare,

Defendant.

JUDGMENT

The above-entitled cause came on regularly to be heard on the 1st day of February, 1954, before the above-entitled Court, in Courtroom 6 thereof, the Honorable Ernest A. Tolin, Judge, presiding; plaintiff Ralph B. Thorbus appearing by Girard F. Baker, his attorney, and defendant Oveta Culp Hobby, Secretary of Health, Education and Welfare, appearing by Laughlin E. Waters by Louis Lee Abbott, her attorney; at said time the Court ordered that briefs be filed and that after the filing of said briefs oral arguments would be heard; briefs were thereafter filed by the parties through their respective counsel, and after the filing of said briefs the matter came on again regularly to be heard in said Courtroom before said Court on April 12, 1954, before the Honorable Ernest A. Tolin, Judge, presiding, said parties appearing by their said [77] counsel, and oral argument having been made to the Court, and additional briefs having been filed with

the Court, and the Court being fully advised and having rendered its written opinion and memorandum of decision and caused the same to be filed herein, and having made and filed herein its written Findings of Fact and Conclusions of Law,

Now Therefore, by reason of the law and the Findings of Fact aforesaid, it is Ordered, Adjudged and Decreed as follows, to wit:

First: That the final decision of the Secretary of Health, Education and Welfare, in which it was determined that the plaintiff herein was not entitled to old-age insurance benefits be, and the same is hereby, reversed;

Second: That plaintiff was a self-employed person within the meaning of the Social Security Act as amended, had paid the self-employment tax required for the years 1951 and 1952, being more than six quarters thereunder; that prior to the 1st day of March, 1953, plaintiff was a fully insured person under said Act and prior to said 1st day of March, 1953, became, and was, ever since has been, and now is entitled to the full old-age insurance benefits provided in said Act for a fully insured person;

Third: That defendant and her subordinates in the Department of Health, Education and Welfare be, and they are hereby, and each of them is hereby, directed, ordered and required to forthwith determine the monthly old-age insurance benefits to which plaintiff is entitled under the Social Security Act as amended as a fully insured individual there-

under, and cause the same to be paid to plaintiff commencing with the month of March, 1953, and thereafter;

Fourth: That plaintiff do have and recover of and from defendant his costs and disbursements incurred in this action.

Done in open court this 10th day of August, 1954.

/s/ ERNEST A. TOLIN,
United States District Judge.

Receipt of Copy acknowledged.

Lodged July 29, 1954.

[Endorsed]: Filed August 12, 1954. [78]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That Oveta Culp Hobby, Secretary of Health, Education and Welfare, the defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on August 12, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

MARVIN ZINMAN,
Assistant U. S. Attorney;

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 30, 1954. [80]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL**

On application of the defendant ex parte, the Court being fully advised, and for good cause shown, hereby orders that the time for filing the Record on Appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by defendant by Notice of Appeal filed August 30, 1954, is extended to November 8, 1954, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: October 8, 1954.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed October 8, 1954. [85]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 85, inclusive, contain full, true and correct copies of Names and Addresses of Attorneys; Complaint; Answer to Complaint, Memorandum of Decision; Objections to Plaintiffs Proposed Findings of Fact; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Contents of Record on Appeal; Order Extending Time for Filing Record and Docketing Appeal, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court, this 2nd day of November, 1954.

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14,575. United States Court of Appeals, for the Ninth Circuit. Oveta Culp Hobby, Secretary of Health, Education and Welfare, Appellant, vs. Ralph B. Thorbus, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed November 3, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

C.A. No. 14,575

OVETA CULP HOBBY, Secretary of Health,
Education and Welfare,

Appellant,

vs.

RALPH B. THORBUS,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Appellant intends to rely upon the following points on appeal of the above-entitled cause:

I.

The District Court erred in reversing the administrative findings when the administrative decision was supported by substantial evidence.

II.

The District Court erred in its construction of the "rentals from real estate" exception to the Social Security laws.

III.

The District Court erred in failing to give sufficient weight to the administrative regulation as a reasonable interpretation of the "rentals from real estate" exception to the Social Security laws.

IV.

The District Court erred in determining that plaintiff was a self-employed person within the meaning of the Social Security Act as amended and was thereby entitled to Old-Age Insurance Benefits provided in said Act.

V.

The District Court erred in granting judgment to plaintiff.

VI.

The District Court erred in awarding costs to the plaintiff in a suit against the administrator.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed November 9, 1954.

